EMERY ENERGY, INC. (ON RECONSIDERATION)

IBLA 82-77, 82-662 Decided September 27, 1982

Reconsideration of the Board's decisions in Emery Energy, Inc., 64 IBLA 175 (1982), and Emery Energy, Inc., 64 IBLA 285 (1982).

Emery Energy, Inc., 64 IBLA 175 (1982), and Emery Energy, Inc., 64 IBLA 285 (1982), sustained.

1. Notice: Generally -- Oil and Gas Leases: Noncompetitive Leases -- Oil and Gas Leases: Stipulations

Where a noncompetitive over-the-counter oil and gas lease is issued without notice to the offeror of an additional stipulation, the lease is not binding on the offeror, and it is without effect in the absence of the offeror's consent to the additional stipulation. However, the offeror's consent to the additional stipulation will be assumed, and the lease presumed to be validly issued, unless the offeror objects to the stipulation within 30 days of its receipt. Any deficiency in the notice procedure for the stipulation is cured when the offeror fails to object timely to imposition of the new stipulation.

APPEARANCES: Mark K. Seifert, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management, petitioner; R. Dennis Ickes, Esq., Salt Lake City, Utah, for Emery Energy, Inc.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Bureau of Land Management (BLM) has petitioned for reconsideration of two Board decisions, Emery Energy, Inc., 64 IBLA 175 decided May 26, 1982, and Emery Energy, Inc., 64 IBLA 285, decided June 4, 1982. In each case

Emery had filed noncompetitive oil and gas lease offers with BLM, and upon issuance of the leases BLM appended certain stipulations about which Emery had no prior notice. Emery objected to the imposition of the "new" stipulations and sought revocation of the leases. BLM refused. The Board held that BLM may not properly add additional stipulations to a lease where the lessee arguably had no notice of the stipulations at the time it filed its lease offers and does not consent to their imposition.

In its brief in support of its petition for reconsideration, counsel for BLM states at page 2:

> In an effort to expedite the issuance of oil and gas leases the Director of BLM issued an instruction memorandum on March 24, 1982 (attached) [Instruction Memorandum No. 82-332] addressing problems caused by requiring applicants to sign lease stipulations prior to lease issuance. This process was cited by the Director as a "major cause of delay in lease issuance." The solution chosen by the Director was that of notifying applicants of certain stipulations after application has been made or upon lease issuance. The Director noted that certain stipulations which may prohibit beneficial development cannot be treated in the manner described above but must be signed by the applicant. These latter stipulations include no surface occupancy, no seasonal occupancy, and wilderness or contingent right stipulations which may prohibit all operations on the leasehold. Approximately 9500 leases have been issued since this new procedure went into effect and many of those leases are potentially affected by the Board's Emery Energy, Inc. decisions. Approximately 62% of all outstanding leases are noncompetitive over-the-counter leases.

It is not clear whether counsel is citing the Instruction Memorandum (I.M.) as support for BLM's actions in these cases. We note, however, that the leases in question in these cases were issued September 9 and 11, 1981, and February 24, and March 18, 1982. The I.M. is dated March 24, 1982. Clearly, BLM could not have been acting pursuant to the I.M. in these cases. In addition, as we have noted in the past, I.M.'s (or Organic Act Directives) "while providing guidance to BLM on many matters, are binding neither on this Board nor on the general public. Cf. Milton D. Feinberg, 37 IBLA 39, 85 I.D. 380 (1978), sustained (On Reconsideration), 40 IBLA 222, 86 I.D. 234 (1979)." Bryner Wood, 52 IBLA 156, 162 n.2, 88 I.D. 232, 235 n.2 (1981).

Moreover, the I.M. Itself supports the Board's action in 64 IBLA 285. The stipulations at issue in that case were "Protection of the Environment (Form N-1)" and "Wilderness Protection (Form N-2)." The Assistant Director, Onshore Energy and Mineral Resources, stated on page 2 of the I.M.:

> You should particularly note that certain stipulations can not be treated by notice in this manner and must be signed by the

> applicant. The Solicitor advises us that the notice procedure is not appropriate for no surface occupancy, no seasonal occupancy, wilderness, and contingent right stipulations which can or do prohibit all operations on the leasehold during a portion of or the entire year. [Emphasis in original.]

The wilderness stipulation is mentioned specifically by the Assistant Director.

Counsel for BLM argues that it is possible to distinguish between stipulations which prohibit exploration and development activities on the leasehold and those which do not. He contends that this is the basis for the distinction drawn by BLM in the I.M. He states that the terms of the lease provide sufficient notice of the continuing authority of the Secretary "to further stipulate the conditions under which the lessee can operate." 1/

He concludes in the brief at pages 4-5:

> The Board apparently assumed that because the objectionable provisions are labelled "Stipulations," they are new lease terms requiring the lease applicant's concurrence. This is decidedly not the case. The stipulations at issue were not of a character which would prevent the beneficial development of the lease. The lessee was not prevented by the added stipulations from enjoying the basic right conveyed by the lease. The stipulations were merely further explanations of the ways in which the Secretary intended to exercise the discretion previously

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1/ Counsel for BLM cites Copper Valley Machine Works, Inc. v. Andrus, 474 F. Supp. 189 (D.D.C. 1979), rev'd 653 F.2d 595 (D.C. Cir. 1981), as upholding the authority of the Secretary to impose further stipulations after lease issuance. Copper Valley is distinguishable on its facts from the present cases. Copper Valley involved a restriction imposed by the Geological Survey on a permit to drill. The restriction was that drilling operations be limited to the winter season only. Copper Valley sought a declaratory judgment in the District Court arguing that the restriction amounted to a "suspension of operations" under 30 U.S.C. § 209 (1976). The District Court ruled against Copper Valley and made a point of stating that the company never sought administrative review of the restriction pursuant to procedures in 30 CFR 290. 474 F. Supp. at 192. The Circuit Court held, however, that Copper Valley was under no obligation to seek review. This was based on its conclusion that the Secretary had authority pursuant to 30 U.S.C. § 209 (1976) to impose such a restriction, but that such a restriction amounted to a suspension of operations, and Copper Valley "could assume that the agency would abide by the provisions of the Act and recognize that the suspension of operations extended the lease at the end of the term thereof." 653 F.2d at 606-07.

We can find no support in Copper Valley for imposing stipulations on a lease without prior notice to the offeror.

> retained by the lease provisions cited above. It is virtually impossible for BLM to provide a specific lease term for every theoretical circumstance involved with particular applications for permits to drill. Thus, flexibility is needed under the lease to adjust to the facts of each application. BLM could stand on the broad language of the lease form, but has instead chosen to provide more detail through the use of "stipulations." It is indeed ironic that this procedure, which is designed both to expedite lease issuance and to aid lessees in planning their drilling operations, could, unless the Board reverses its earlier decisions result in great confusion by clouding titles to thousands of leases.

Counsel for Emery states, on the other hand, that it is impossible to differentiate between stipulations on the basis of what is required or prohibited. Emery argues that "[i]t is sufficient that the terms of the lease are different than those offered by Emery."

[1] There has been no attempt by counsel for BLM to address the rationale for our Emery decisions. Instead, he directs our attention to the terms of the lease and states that the Secretary has authority to impose other conditions on a lessee. However, he does not attempt to rebut the specific language of the offer to lease/lease form as quoted in a footnote in each of our decisions. The language of the footnote is:

> Item 5(c) on the fact of the offer to lease/lease form provides: "Offeror accepts as a part of this lease, to the extent applicable, the stipulations provided for in 43 CFR 3103.2." This is an outdated reference. The present cite is 43 CFR 3109.4-2. However, the substance of the regulation is no different and its basic content is set forth under the comparable item 5(c) of the "Special Instructions" on the reverse side of the offer to lease/lease form:
>
> > Whenever applicable the stipulations referred to will be made a part of this lease and will be furnished the lessee with the lease when issued. The forms covering them with a brief description are as follows: 3102 Stipulations for lands where the surface control is under the jurisdiction [of] the Department of Agriculture; 3103-1 Lands potentially irrigable, lands within the flow limits of a reservoir site, lands within the drainage area of a constructed reservoir; 3500-1 Lands withdrawn for power purposes; and 3120-3 Wildlife Refuge, Game Range, and Coordination Lands. Whenever other stipulations are necessary, lessee will be required to agree to them before the issuance of the lease. (Emphasis added.)

64 IBLA at 178 n.2, 64 IBLA at 287 n.3.

Thus, the offer to lease/lease form itself requires that other stipulations be presented to the lessee before the issuance of the lease.

We are cognizant of the delay problems attendant with lease issuance; however, adoption of a process which involves issuance of leases without notice of stipulations to the lessee prior to lease issuance does not provide the proper solution for the delay problem.

We stated in our Emery decision that Departmental regulations provide the methodology for notification in simultaneous oil and gas leasing and competitive oil and gas leasing situations. 64 IBLA at 179; 64 IBLA at 287. Yet there are no comparable regulations relating to over-the-counter oil and gas lease offers. As implied in our decisions, publication could suffice for such offers. 2/

Counsel for BLM argues that our Emery decisions "result in great confusion by clouding titles to thousands of leases." This is, as pointed out by counsel for Emery, incorrect.

Our Emery decisions are premised on the legal theory that BLM's attempt to require stipulations without notice to the offeror amounts to a counter offer. 3/ As a counter offer, it requires acceptance by the original offeror. In these cases, in essence, Emery rejected the "counter offers." Since the leases had issued, we required that they be cancelled.

If lessees in other cases, however, have not objected to BLM's counter offers, those lessees must be considered to have accepted the counter offers, and the leases have been validly issued. Unless an offeror objects within 30 days of receipt of the counter offer, it must be considered to have accepted that counter offer. Since Emery objected, we were required to examine the procedure. We found it lacking in that it failed to provide proper notice. Our decisions do not affect leases previously issued. The deficiency in BLM's notice procedure is cured when the offeror fails to object timely to imposition of new stipulations. Thus, our decisions in Emery cannot be considered as causing the cataclysmic result ascribed by counsel for BLM.

2/ We note that on page 2 of the I.M. It is stated:

"The standard surface protection clause in the Surface Disturbance Stipulations (Form 3109-5) is automatically part of the lease by virtue of the fact that it was published in the Federal Register with due notice that it is included in the lease and assented to by the lessee upon application for the lease without the requirement of the lessee's signature." No citation is given to the Federal Register. However, assuming that the substance of the surface disturbance stipulation was published as stated in the I.M., such notice would be sufficient to bind the offeror.

3/ A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance, but is a counter offer. Daly v. Bright, 413 F. Supp. 28 (D. Pa. 1975).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions, Emery Energy, Inc., 64 IBLA 175 (1982), and Emery Energy, Inc., 64 IBLA 285 (1982), are sustained.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Anne Poindexter Lewis
Administrative Judge